Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CLYDE W. BANKS AND MARGARET L. BANKS,

Petitioners,

versus

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL I. SILVERMAN
SILVERMAN & MCDONALD
1010 N. Bancroft Parkway
Wilmington, DE 19805
(302) 888-2900

MARINA TRAMONTOZZI
Counsel of Record
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

Attorneys for Petitioners

4800

QUESTION PRESENTED

I. WHETHER THE OPINION BELOW CONFLICTS WITH THE COURT'S PRIOR RULINGS INVOLVING THE ISSUES OF CHOICE OF LAW ANALYSIS AND THE PROTECTIONS AND BENEFITS AFFORDED WORKERS INJURED WHEN TRAVELING BEYOND THE BORDERS OF THE FORUM STATE.

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Petitioners, Clyde and Peggy Banks, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Banks v. Virginia Elec. & Power Co.*, 2000 U.S. App. LEXIS 2400 (4th Cir. Md. Feb. 17, 2000) is unpublished and is contained in the Appendix at p. 1a.

The memorandum opinion of the United States District Court for the Maryland District, Southern Division in in *Banks v. Virginia Elec. & Power Co.*, (D. Md. 1999) is unpublished and is contained in the Appendix at p. 18a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 17, 2000. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USCS § 1446 (p. 30a)

28 USCS § 1332 (p. 32a)

STATEMENT OF THE CASE

The fundamental question is whether the Petitioner, or any injured worker of a multi-state employer, is entitled to the rights and protections afforded by the forum states or the laws of a state where the injury occurs. To fully appreciate the significance of this case it is essential to consider the factual background.

A. Background.

Respondent, Virginia Power, is a public service corporation that produces, distributes, and sells electrical service in the Commonwealth of Virginia and the State of Maryland. In September 1996, Hurricane Fran stuck the Commonwealth of Virginia which caused significant damage to the Respondent's transmission lines and resulted in wide spread power interruption. Pursuant to an existing contract between Asplundh Expert Tree Company, the Petitioner's principle employer, and Virginia Power, Asplundh work crews, from the State of Maryland traveled to Virginia to assist in the restoration of electrical power.

The Petitioner, Clyde Banks, a resident of the State of Delaware, but primarily employed in the State of Maryland was directed, by his primary employer, to travel with is work crew to Virginia to assist in the clean-up.

On September 10, 1996, after being in the Commonwealth of Virginia for a mere handful of hours, the Petitioner was electrocuted and seriously injured when a Virginia Power employee re-energized a transmission line where Petitioner was working.

At the time of Petitioner's injury, Virginia Power was self insured for workers' compensation benefits. Asplundh, the primary employer, assumed the obligation under

Maryland's workers' compensation laws.

A claim was brought by Petitioner and his wife, in the Circuit Court for Prince George County, Maryland, alleging negligent and/or intentional conduct on the part of Virginia Power. Virginia Power removed the action to the United States District Court for the District of Maryland, at Greenbelt, on the basis of diversity of citizenship.

Virginia Power filed a Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1), arguing the District Court lacked subject matter jurisdiction because Virginia Power was the Petitioner's statutory employer and therefore the sole remedy, under Virginia law, was workers' compensation benefits. The District Court granted the Motion and dismissed the claim. On appeal to the United States Court of Appeals for the Fourth Circuit the decision of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE COURT'S PRIOR RULINGS INVOLVING THE ISSUES OF CHOICE OF LAW ANALYSIS AND THE PROTECTIONS AND BENEFITS AFFORDED WORKERS INJURED WHEN TRAVELING BEYOND THE BORDERS OF THE FORUM STATE.

The most important issue in this case is whether Maryland Workers' compensation law or Virginia Workers' Compensation Law should be applied. If Maryland law is applied, Mr. and Mrs. Banks can pursue their claim for the devastating injuries suffered by Mr. Banks. If Virginia law is applied, Virginia Power may not be responsible for the

injuries inflicted on Mr. Banks by Virginia Power and Virginia Power employees.

Mr. Banks is employed in Maryland by Asplundh Tree Expert Co. He works primarily in Maryland. He had been paid Maryland workers compensation benefits by his Maryland employer. Clyde Banks was sent by his Maryland employer to Virginia to provide emergency help in restoring electric power to Virginia Power customers lost as a result of a hurricane. Mr. Banks was seriously and permanently injured when he was electrocuted as a result of the negligent and/or grossly negligent conduct of Virginia Power and its employees. Mr. and Mrs. Banks brought their complaint in Maryland State Court seeking damages to compensate them for their losses.

Virginia Power removed the action from Maryland State Court to the United States District Court based on its averment that complete diversity existed between the parties and the damages sought exceeded the jurisdictional minimum limit. Virginia Power then filed a Motion to Dismiss pursuant to F.R.C.P. 12(b)(1) based on the contention that since the injury was sustained in Virginia, Virginia Worker's Compensation law must be applied.

Since the complaint was brought in Maryland, the District Court was required to look to Maryland law to determine whether Maryland or Virginia workers compensation law should be applied. The District Court held that Maryland's acceptance of the general rule of lex loci delicti required that Virginia workers compensation law be applied since the injury occurred in Virginia. The District Court's application of the lex loci delicti rule was error.

The Maryland Court of Appeals has rejected the automatic application of the lex loci delicti rule in workers compensation cases. In *Hauch v. Connor*, Md.App., 453

A.2d 1207, 1214 (1983), the Court held that "Maryland workmen's compensation law should determine the threshold question of the right to bring suit in Maryland courts." In *Hauch*, two Maryland employees of a Maryland company, acting within the scope of their employment, were traveling together in an automobile. While traveling in Delaware, an accident occurred as a result of the driver's negligence and the passenger was injured. The passenger employee received Maryland workers compensation and brought a tort suit against the driver employee. The driver defended on the basis that Delaware barred suits against co-employees. *Id.* At 1208.

The Maryland Court held that the rule of lex loci delicti is the established law of Maryland. Id at. 1209. Therefore, the substantive tort law of Delaware would be applied as it was the state where the accident and alleged negligent conduct occurred. *Id.* At 1210. However, the Court then stated that "Our continued adherence to the rule of lex loci delicti, however, does not end the inquiry issue in the present case. Here we are concerned not with the differences between Maryland and Delaware tort law, but with the differences in the workmen's compensation law of the two states." *Id.* (Emphasis added).

Under the Delaware workers compensation law, the courthouse door is barred to employees for all causes of action against co-employees. The Maryland law does not bar the courthouse door to such causes of action and permits suits against co-employees. Long ago courts would apply the rule of lex loci delicti in workers compensation cases but "this approach was quickly disapproved by state legislatures. As a result, virtually all workmen's compensation statutes today contain their own choice of law provisions and cover out-of-state injuries." *Id.* at 1210-1211. Many courts recognize that workers' compensation law conflict issues present distinct policy questions and should not be treated as tort or contract

matters for choice of law purposes. The Maryland Court agreed. *Id.*

With regard to the threshold matter of whether the court is open to a particular litigant, the policy of the forum state is extremely important. The bar or absence of a bar in a state's workers compensation law is analogous to the bar of a state's statute of limitations which is "of course" controlled by the law of the forum state. *Id.* At 1214.

The *Hauch* Court looked to the policy of the Maryland workers compensation law. It held that while the injury did not occur in Maryland, there were greater Maryland interests in that the parties were Maryland residents, their normal place of employment was Maryland and the plaintiff made a claim for and received Maryland workers compensation. Therefore, Maryland workers compensation law would determine the threshold question of the right to bring suit in a Maryland court. *Id.*

Several years later, the Maryland Court of Appeals considered another workers compensation case to again determine whether Delaware or Maryland workers compensation law should be applied. *Bishop v. Twiford,* Md.App., 562 A.2d 1238 (1989). In *Bishop*, the driver employee was a resident of Pennsylvania and the passenger employee was a resident of Maryland. Both were employees of a Delaware corporation but worked primarily in Maryland. While driving in Maryland, an accident occurred due to the negligence of the driver employee. The passenger was paid benefits under the Delaware workers compensation act. *Id.* At 1240, 1241.

The *Bishop* Court looked to *Hauch* for the interests that must be weighed in determining which law should be applied. The Court considered four factors and decided that: 1) Maryland's public policy was to allow fellow employee

suits; 2) The parties were Maryland residents; 3) The parties were normally employed in Maryland; and 4) The parties applied for and received Maryland workers compensation benefits. The most important factor weighing in favor of applying Maryland law was the public policy of Maryland, the forum state, permitting fellow employee actions. *Bishop v. Twiford*, Md.App., 562 A.2d at 1242.

In *Powell v. Erb*, Md.App., 709 A.2d 1249, 1295 (1998), the Court of Appeals again reviewed the *Hauch* decision and noted that: "the Court made clear that the relevant choice of law principles were those of workers' compensation law, rather than tort law, and that the choice of law decision turned on the determination of which jurisdiction had the greater interest. *Id.* (emphasis added). The Court also noted that in an earlier decision, "having established the applicability and importance of public policy...we recognized that resolution of the choice of law issue would determine 'whether the court is open to a particular litigant,' a threshold inquiry." *Id.* At 1297, citing *Hauch* 453 A.2d at 1214.(emphasis added). The Court went on to say, that as to the threshold inquiry, " 'the policy of the forum state is extremely important,' and we analogized the presence or absence of a bar in the state's workers' compensation law to a state's statute of limitations, which also 'is controlled by the law of the forum.' " *Id.* citing *Hauch* 453 A.2d at 1214. Finally, the Court summarized the conclusion in *Hauch* "that the Maryland workers' compensation law also should resolve the threshold question...although the injury did not occur in Maryland, there are greater Maryland interests." *Id.* citing *Hauch* 453 A.2d at 1214. (Emphasis added.)

The Court of Appeals in *Hauch* discussed the general rule in actions by an employee against his employer. The forum state will usually enforce a bar created by the exclusive-remedy statute of any state in which the employer

may be liable for workers' compensation benefits. *Id.* This general rule relies on a shared burden rationale, that is, where the employer has the shared burden by insuring its employees against workplace injury, they are immune from suit. *Id.* The application of the shared burden rationale supporting employer immunity should not dictate the result of this claim, just as it did not dictate the result in *Hauch*.

Asplundh is a Maryland-based employer, and Virginia Power is licensed and does business in Maryland. Like the Plaintiff's in *Hauch*, the Petitioner claimed and received benefits under the Maryland Workers' Compensation Act. Further Virginia Power had contractually shifted the entire risk of workers' compensation claims to Asplundh, requiring it to fully insure its employees. By agreement with Virginia Power, Asplundh was required to secure an endorsement to its workers' compensation policy providing that the policy could not be canceled, non-renewed or materially changed without a thirty day prior written notice to Virginia Power. Virginia Power could not be held responsible to Petitioner on a workers' compensation claim. Because Virginia Power did not, in fact, share the risks of Petitioner's injury, the shared burden relied upon by the Court of Appeals, supporting the general rule of employer immunity does not apply. Under the *Hauch* "greater interests" test, Maryland's public policy governs and requires the application of Maryland Law rather than the law of the Commonwealth of Virginia. The Petitioner is not a statutory employee. Virginia Power is merely a third party tortfeasor. *See* Md. Code §9-508 (defining "statutory employer"); *Matthews v. United States*, 825 F.2d 35, 37 (4th Cir. 1987).

Applying the four factor *Hauch* test in this case requires the application of Maryland workers compensation law, not Virginia workers compensation law. First, it is Maryland's public policy and law to permit this suit against Virginia Power since Virginia Power was not Mr. Banks's

employer or statutory employer under Maryland law.[1] Second, while Mr. and Mrs. Banks are residents of Delaware, Mr. Banks' direct employer, Asplundh, is a company doing business in Maryland. Virginia Power is a corporation of Virginia but it too is licensed to do business and does conduct business in Maryland. Third, Mr. Banks is normally employed in Maryland. And, fourth, Mr. Banks applied for and received Maryland workers compensation benefits. While all four factors indicate that Maryland would apply Maryland workers' compensation law, it must be emphasized that the Maryland Court of Appeals has made it clear that the most important factor weighing in favor of applying Maryland law is the public policy of Maryland, the forum state. *Bishop v. Twiford,* Md.App., 562 A.2d at 1242.

Maryland would permit Mr. and Mrs. Banks to pursue their suit against Virginia Power. Maryland would protect the rights of a Maryland employee guaranteed by Maryland law. Maryland would not preclude a Maryland employer from seeking reimbursement of its substantial workers compensation lien from a Virginia company whose negligent conduct resulted in the injury to its employee. Maryland would not put the interests of a Virginia corporation who does business in Maryland above the interests of a Maryland worker temporarily sent by his Maryland employer to Virginia to help in an emergency situation. The Maryland Court would not find that a Maryland worker gives up his rights and protections under the Maryland workers compensation law by merely crossing the state line. For the United States Court of Appeals for the Fourth Circuit to find to the contrary was error.

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[1] See, *Brady v. Ralph Parsons Company*, Md.App., 520 A.2d 717 (1987) and *Lathroum v. Potomac Electric Power Co., Inc.*, Md.App., 524 A.2d 1228 (1987).

CONCLUSION

This case presents a question of exceptional importance to all employees traveling beyond the forum state and injured in the course of their employment. If the holding below is allowed to stand the Petitioner, as well as any injured employee by merely crossing a state's boundary line, to be denied the benefits and protections of the forum State. The United States Circuit Court of Appeals for the Fourth Circuit, appreciated the complex factors involved with injured workers and the interplay of multi-state employment. The Court mis-applied its own holding and doing so raises serious questions of employee rights and protections when traveling beyond the forum state. By granting the Petition of Certiorari this Court can correct the Fourth Circuit's erroneous decision.

Accordingly, the Petitioner respectfully request that the petition for writ of certiorari be granted.

Michael I. Silverman
SILVERMAN & MCDONALD
1010 N. Bancroft Parkway
Wilmington, Delaware 19805
(302) 888-2900
Attorneys for Petitioner

Marina Tramontozzi
Counsel of Record
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

(any footnotes trail end of each opinion/decision)

No. 99-1392

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CLYDE W. BANKS; MARGARET L. BANKS, Plaintiffs-Appellants,

v.

VIRGINIA ELECTRIC & POWER COMPANY, a Corporation of the Commonwealth of Virginia, licensed to do business in the State of Maryland, Defendant-Appellee.

December 2, 1999, Argued

February 17, 2000, Decided

NOTICE:
RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL:
ARGUED: Robert C. McDonald, HERMANN, SILVERMAN & MCDONALD, Wilmington, Delaware, for Appellants.

Earle Duncan Getchell, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellee.

ON BRIEF: Barbara J. Gadbois, HERMANN, SILVERMAN & MCDONALD, Wilmington, Delaware, for Appellants.

Elizabeth Butterworth-Stutts, Joseph M. English, IV, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellee.

JUDGES:
Before TRAXLER and KING, Circuit Judges, and Margaret B. SEYMOUR, United States District Judge for the District of South Carolina, sitting by designation. Judge Traxler wrote the majority opinion, in which Judge Seymour joined. Judge King wrote a dissenting opinion.

OPINIONBY:
TRAXLER

OPINION:

TRAXLER, Circuit Judge:

Plaintiffs Clyde W. Banks ("Banks") and Margaret L. Banks appeal the district court's dismissal of their action against Virginia Electric & Power Company ("Virginia Power") under Federal Rule of Civil Procedure 12(b)(1). The district court concluded that Banks was the statutory employee of Virginia Power and, therefore, that Banks' exclusive remedy was for workers' compensation benefits. We affirm.

I.

Defendant Virginia Power is a Virginia public service corporation that produces, distributes, and sells electrical service. In September 1996, Hurricane Fran hit the Commonwealth of Virginia, resulting in fallen trees and limbs damaging Virginia Power's lines and interrupting electrical service. Pursuant to an existing contract between Asplundh Expert Tree Company ("Asplundh") and Virginia Power, Asplundh work crews from the state of Maryland traveled to Virginia to assist in cleaning up the fallen trees

and limbs so that power could be restored to the affected areas.

At the time, plaintiff Banks, a resident of Delaware, was employed by Asplundh as a supervisor of tree trimming crews. Although Banks primarily worked in the state of Maryland, his crew was assigned to work in Virginia pursuant to the Asplundh-Virginia Power contract. Around midnight on September 10, while Banks and his crew were removing tree limbs from a Virginia Power distribution line in Clover, Virginia, the power line became re energized and Banks received a severe electrical shock. Banks sought and received workers' compensation benefits for his injuries from Asplundh pursuant to the Maryland workers' compensation laws. At the time, however, Virginia Power was self-insured for workers' compensation benefits and, had Asplundh failed to provide such benefits, Virginia Power would have been liable under Virginia law to pay workers' compensation benefits to Banks.

Asserting that the power line was either negligently or intentionally re-energized by Virginia Power employees, Banks and his wife instituted this action against Virginia Power in the state circuit court for Prince George's County, Maryland, for negligence, gross negligence and loss of consortium. Pursuant to 28 U.S.C.A. § § 1332(a) (West 1993 & Supp. 1998) and 28 U.S.C.A. § 1446 (West 1994 & Supp. 1998), Virginia Power removed the action to the federal district court in Maryland on the basis of diversity of citizenship.

Virginia Power then filed a motion to dismiss the action, pursuant to Rule 12(b)(1), asserting that the court lacked subject matter jurisdiction because Virginia Power was Banks' statutory employer at the time of his accident and, therefore, that Banks' exclusive remedy under Virginia law was for workers' compensation benefits. See Va. Code Ann. § § 65.2-307 (Michie Supp. 1999), 65.2-700 (Michie 1995).

The district court agreed, and dismissed the action. We affirm.

II.

A.

We begin with Banks' contention that the district court erred in dismissing the case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because the case had already been properly removed on the basis of diversity of citizenship. Basically, Banks asserts that because the parties were diverse and the jurisdictional minimum was met, Virginia Power could only have moved to dismiss the action on the basis of Federal Rule of Civil Procedure 12(b)(6). Apparently, Banks believes that he would have had a better chance of prevailing on a motion under this latter rule because the inquiry would have been limited to the complaint allegations.

We find this position untenable. Based upon the complaint allegations, the district court had original jurisdiction over this matter by virtue of the diverse nature of the parties and the jurisdictional amount, see 28 U.S.C.A. § 1332(a), and the case was properly removed, see 28 U.S.C.A. § 1441(a). This does not, however, determine the question of whether the district court lacked subject matter jurisdiction over the state causes of action because Banks was acting as a statutory employee of Virginia Power when he was injured. And, of course, Virginia Power's removal cannot forever bar it from raising a subject matter jurisdiction defense, which can be raised at any time. See Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999).

Nor are we persuaded that Rule 12(b)(1) is otherwise an improper vehicle for raising the issue before the district court. Indeed, we recently affirmed a district court's dismissal of a tort action, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), because the plaintiff was the statutory

employee of the defendant and, therefore, limited to an action for workers' compensation benefits before the state's workers' compensation tribunal. See Evans v. B.F. Perkins Co., 166 F.3d 642, 647-50 (4th Cir. 1999). In that case, we specified our standard of review as follows:

> The plaintiff has the burden of proving that subject matter jurisdiction exists. See Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), "the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Id. The district court should grant the Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Id. A district court's dismissal of a case for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is subject to de novo review.

Evans, 166 F.3d at 647.

In summary, we find no merit to plaintiff's contention that the district court improperly utilized Rule 12(b)(1) to dismiss his action. There is no dispute as to the underlying jurisdictional facts, only as to whether Maryland law or Virginia law should decide the question of whether Banks, when he was injured, was acting as a statutory employee of Virginia Power. Accordingly, we now turn to this ultimate question.

B.

1.

Although a resident of Delaware and primarily employed in the state of Maryland, Banks was injured in the Commonwealth of Virginia. The Maryland district court, applying Virginia law, dismissed Banks' action against Virginia Power because in the Commonwealth of Virginia, an employee's exclusive remedy against his employer for an on-the-job injury is one for workers' compensation benefits:

> The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

Va. Code Ann. § 65.2-307(A) (emphasis added).

The benefits of this exclusive remedy provision also run to an employee's "statutory employer," who, under certain circumstances, may be held liable for workers' compensation benefits under Virginia law:

> When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker

> employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

Va. Code Ann. § 65.2-302(A) (Michie Supp. 1999). In return for this potential liability, the exclusive remedy provisions of § 65.2-307 extend to the statutory employer, regardless of whether the immediate employer can pay or has paid workers' compensation benefits to the employee. See Sykes v. Stone & Webster Eng'g Corp., 186 Va. 116, 41 S.E.2d 469 (Va. 1947).

If Virginia law is applicable to Banks' action, Banks' was the statutory employee of Virginia Power at the time of his accident and, therefore, his action against Virginia Power would indeed be barred by the exclusive remedy provision of the Virginia Workers' Compensation Act. Thus, we turn to Banks' contention that Maryland law, instead of Virginia law, governs resolution of his status in this regard. If so, Banks asserts, Maryland law would not bar his claims.

> "[A] federal court sitting in diversity jurisdiction must apply the choice-of-law rules of the forum state." Motor Club of Am. Ins. Co. v. Hanifi, 145 F.3d 170, 177 (4th Cir.), cert. denied, 525 U.S. 1001, 119 S. Ct. 509, 142 L. Ed. 2d 423 (1998). As a general rule, Maryland follows the rule of lex loci delicti. See Hauch v. Connor, 295 Md. 120, 453 A.2d 1207, 1210 (Md. 1983). In Hauch, however, the Maryland Court of Appeals carved out a narrow exception to this traditional rule in cases where an employee brings suit against his co-employee for injuries sustained in another jurisdiction.

Specifically, Hauch involved a tort action brought by a Maryland resident against his co-employee, also a Maryland resident, for an accident which happened to occur during a trip into Delaware. Under the workers' compensation laws of Delaware, such a suit between co-employees was barred, while Maryland law would permit it. Noting the "distinct policy questions" presented by such cases, the Maryland Court of Appeals rejected application of the traditional rule of lex loci delicti in favor of a "greater interest" test and, after determining that Maryland had the greater interest in the case before it, allowed the suit to proceed. 453 A.2d at 1214.

This case does not involve a co-employee suit. However, Hauch is instructive by virtue of the distinction the Maryland Court of Appeals drew between co-employee lawsuits and lawsuits, such as the one before us, which are brought by an employee against a statutory employer:

> Suits by employees against their immediate employers for injuries arising out of and in the course of employment are now barred by virtually all workmen's compensation statutes in this country. Nevertheless, "because of the varying rules as to the availability of the exclusive-remedy defense to the statutory employer," choice of law issues arise with respect to suits against statutory employers. In these suits, it is generally held that the forum state will enforce a bar created by the exclusive remedy statute of any state in which the employer may be liable for workmen's compensation benefits.

Id. at 1211 (internal citation omitted) (emphasis added). Having recognized this virtually unanimous rule, and noting no exception to it, the court went on to recognize the policy considerations which warrant the distinction:

> Although the outcome in some of these cases is the same as it would be if the rule of lex loci delicti were applied, the underlying rationale in holding the employer immune is different. The rationale is that the employer has undertaken the burden of supplying workmen's compensation insurance in return for immunity from suit. . . . The rationale for precluding employee-employer suits, however, does not apply in actions by employees against fellow employees.

Id. at 1211-12 (internal citations omitted) (emphasis added). Simply stated, the Maryland court recognized that policy counsels in favor of according statutory employers the benefit of the jurisdictional bar in suits against them because, unlike in the case of co-employees, the statutory employer is also subject to the burden of liability for workers' compensation benefits to the injured employee in the other jurisdiction.1

The language in Hauch seems clear to us, and its rationale is sound. Under Maryland choice-of-law principles, a tort action by an employee against his co-employee for injuries occurring during the employment may not be barred pursuant to another jurisdiction's workers' compensation laws if Maryland has a greater interest in the lawsuit.2 But a suit by a statutory employee against a statutory employer will be barred pursuant to another jurisdiction's workers' compensation laws if the statutory employer could also be held liable for workers' compensation benefits to the employee in the other jurisdiction. Accordingly, we agree with the district court's conclusion that Maryland state courts would enforce Virginia's exclusive remedy bar in this case.

In so holding, we obviously disagree with the assertion that the general rule of applying another state's jurisdictional bar has no application simply because the statutory employer has contractually required the subcontractor to obtain and

maintain its own workers compensation policy. First, it is unlikely that a statutory employer could ever shift the entire risk of liability to a subcontractor, which can become insolvent and/or uninsured at any time. And just as the actual payment of workers' compensation benefits is not a condition precedent to a statutory employer gaining the benefit of an exclusive remedy provision, attempts on the part of a statutory employer to reduce its risk as a means of escaping workers' compensation liability have been rejected. See Commercial Union Ins. Co. v. Harleysville Mut. Ins. Co., 110 Md. App. 45, 675 A.2d 1059, 1067 (Md. Ct. Spec. App. 1996).

In Commercial Union, the Maryland court, presented with a similar, albeit "flip-side," claim, rejected a principal contractor's assertion that it was entitled to escape workers' compensation liability to an injured subcontractor's employee because the principal contractor had requested a certificate of insurance from the subcontractor showing that the subcontractor had obtained a workers' compensation insurance policy. The subcontractor had obtained workers' compensation insurance, but limited it to coverage within Virginia, and the accident occurred on a work site in Maryland. The court, while "empathizing with the plight of [the] general contractor in this situation," held that the insurer for the statutory employer was nonetheless liable for workers' compensation benefits, noting that "we need not detain ourselves long in resolving this question because neither the language of the statute itself, nor caselaw interpreting it, creates an escape hatch based upon commercially reasonable behavior by a statutory employer." 675 A.2d at 1067; see also Para v. Richards Group of Washington Ltd. Partnership, 339 Md. 241, 661 A.2d 737, 746-47 (Md. 1995) (holding statutory employer, who had contractually required subcontractor to maintain workers' compensation insurance covering its own employees and naming the statutory employer as an insured, immune from suit under Maryland

workers' compensation laws); Cogley v. Schnaper & Koren Constr., 14 Md. App. 322, 286 A.2d 819, 824-25 (Md. Ct. Spec. App. 1972) ("We think the legislative purpose in enacting [the statutory employer provision of the Workmen's Compensation Act] was to further the benevolent concept of Workmen's Compensation and to achieve that result by providing an incentive to the principal contractor to see that his subcontractors carry Workmen's Compensation insurance upon their employees."). Accordingly, we fail to see how VEPCO's attempts to ensure that its subcontractors carried workers' compensation insurance would either insulate it from potential workers' compensation liability or deprive it of the benefit of the exclusive remedy bar.

C.

Banks' final assertion that the district court erred in concluding that Virginia Power was his statutory employer is based exclusively upon his contention that he is not such an employee under Maryland's workers' compensation laws. Banks has not appealed, and does not argue, that Virginia Power would not be his statutory employer under Virginia workers' compensation laws.3 Because Virginia law governs the issue, the district court did not err in dismissing Banks' tort action under Rule 12(b)(1) for lack of subject matter jurisdiction.

III.

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

----------Footnotes----------

[1] Banks has offered an alternative argument that Hauch's rationale for distinguishing statutory employer suits from co-employee suits is not applicable in this case because Virginia Power did not procure "workers' compensation insurance"

and, instead, is self-insured. Obviously, this proffered distinction is meaningless. Under the Virginia Workers' Compensation Act, an employer is required to insure his liability either through self-insurance, achieved by meeting the solvency and other requirements necessary to obtain certification to self-insure from the Virginia Workers' Compensation Commission, or through "an insurer authorized to transact the business of workers' compensation insurance in the Commonwealth." Va. Code Ann. § 65.2-801(A) (Michie Supp. 1999). Because a statutory employer has a duty to insure the payment of workers' compensation, either through commercial insurance or self-insurance, he is immune from a suit in tort.

[2] Banks reliance upon the later cases of Bishop v. Twiford, 317 Md. 170, 562 A.2d 1238 (Md. 1989), and Powell v. Erb, 349 Md. 791, 709 A.2d 1294 (Md. 1998), adds nothing to his argument. Both were similarly concerned solely with suits between co-employees, not suits against statutory employers.

[3] It appears that Banks asserted before the district court that he was not a statutory employee under Virginia law because his injury was the result of intentional conduct and, thereby, excepted from the exclusive remedy provisions of the Virginia act. Banks has not pursued this claim on appeal.

DISSENTBY:
KING

DISSENT:

KING, Circuit Judge, dissenting:

I disagree with the determination that Maryland's choice-of-law principles would result in the application of Virginia law to this case, and I would therefore reverse the district court's judgment. Alternatively, the question merits

certification to the Court of Appeals of Maryland. For these reasons, I respectfully dissent.

I.

While Mr. Banks was working for Asplundh on Virginia Power's (VEPCO's) downed power lines, VEPCO energized the lines, electrocuting him twice. Mr. Banks was severely injured and, during his several hospitalizations, endured multiple surgeries, skin grafts, and amputation. My conclusion is that, applying Maryland law, Maryland has the "greater interest" in this action; consequently, Maryland workers' compensation law applies. As a result, VEPCO is a third-party tortfeasor rather than a statutory employer, and Mr. Banks may maintain his action against VEPCO.

Under Maryland's workers' compensation law, the "threshold question" of Mr. Banks's right to maintain this personal injury action against VEPCO must be resolved by Maryland's "greater interests" test, before looking to any state's definition of a "statutory employer."1 Hauch v. Connor, 295 Md. 120, 453 A.2d 1207, 1214 (Md. 1983). This test permits courts to implement the "extremely important" public policy of the forum state, i.e., Maryland. Id. The Court of Appeals of Maryland has explained the logic of its Hauch decision as follows:

> This Court was concerned with the determination of the rights of litigants under the different workers' compensation laws of two states. We resolved the issue by looking to the public policy of the forum state [Maryland] and weighing its interest against that of the state in which the wrongful act occurred.

Powell v. Erb, 349 Md. 791, 709 A.2d 1294, 1299 (Md. 1998) (expanding the "greater interests" test to encompass

wrongful death actions, notwithstanding a Maryland statute directing application of the substantive law of another state, if the death occurs outside of Maryland).

In Hauch, where an employee brought an action in Maryland for an employment-related injury that occurred in another state, the court applied the "greater interests" test by analyzing public policy rationales supporting the general workers' compensation exclusive remedy rule. 453 A.2d at 1211 & n.3 (citing cases). The Hauch court noted that judicial decisionmakers rarely view competing public policies in the abstract, but instead examine those policies within the context of the specific facts confronting them; blanket application of a general rule should be avoided. See id. The court concluded that the reasons for barring employee suits against employers did not support such a bar under the circumstances in Hauch, a suit by an employee against a co-employee. Id.

The Court of Appeals in Hauch discussed -- in dicta -- the general rule in actions by an employee against his employer, that the forum state will usually enforce a bar created by the exclusive-remedy statute of any state in which the employer may be liable for workers' compensation benefits. Id. This general rule relies on a shared burden rationale, that is, where the employer has shared the burden by insuring its employees against workplace injury, it receives immunity from suit.2 Id. However, application of the shared burden rationale supporting employer immunity does not dictate the result of this case, just as it did not dictate the result in Hauch.

Like the plaintiffs in Hauch, Mr. Banks's regular place of employment is Maryland; he was sent by his employer to Virginia in 1996 on a short-term, emergency basis after Hurricane Fran struck the Commonwealth. Asplundh is a Maryland-based employer, and VEPCO is licensed and does

business in Maryland. Like the plaintiffs in Hauch, Mr. Banks claimed and received benefits under the Maryland Workers' Compensation Act. Further, VEPCO had contractually shifted the entire risk of workers' compensation claims to Asplundh, requiring it to fully insure its employees. Also, by agreement with VEPCO, Asplundh was required to secure an endorsement to its workers' compensation insurance policy providing that the policy could not be cancelled, non-renewed, or materially changed by Asplundh without a thirty-day prior written notice to VEPCO. Thus, on the facts here, VEPCO could not be held responsible to Mr. Banks on a workers' compensation claim.

Because VEPCO did not in fact share the risks of Mr. Banks's injury, the shared burden rationale supporting the general rule of employer immunity does not apply.3 Thus, under the Hauch "greater interests" test, Maryland's public policy governs here, and it requires application of Maryland law rather than Virginia law. Under Maryland law, VEPCO is not Mr. Banks's "statutory employer;" instead, VEPCO is merely a third-party tortfeasor. See Md. Code § 9-508 (defining "statutory employer"); Matthews v. United States, 825 F.2d 35, 37 (4th Cir. 1987). In these circumstances, I am convinced that Maryland would recognize that Mr. Banks has the right to maintain this action against VEPCO.

As I observed earlier, the majority grounds its analysis of Maryland law on dicta found in the Hauch decision, that:

> It is generally held that the forum state will enforce a bar created by the exclusive remedy statute of any state in which the employer may be liable for workmen's compensation benefits.

Hauch, 453 A.2d at 1211 (citing Larson, Workmen's Compensation Law, § 88.10 at 16-132 (1982)). The majority

decision would elevate the Hauch dicta to the high status accorded a rule of law, and it would inflexibly apply that rule to the facts here. To do so is incorrect, in my view, because the only applicable rule of law to be drawn from Hauch is the "greater interests" test. Applied here, the "greater interests" test requires that we reinstate Mr. Banks's action.

II.

In the alternative, I would certify the question to the Court of Appeals of Maryland, seeking its determination of whether the "greater interests" test applies to the circumstances here. See, e.g., Flannery v. United States, 649 F.2d 270 (4th Cir. 1981) (certifying question to the Supreme Court of Appeals of West Virginia, where the state court decisions recognized a right but offered no guidance on the resolution as applied to the facts before the court); Md. Code § § 12-601 through 12-613 (authority and procedures for certifying questions to the Maryland courts).

III.

For the reasons stated above, I would reverse and remand, or in the alternative, certify the question to the Court of Appeals of Maryland. I respectfully dissent.

----------Footnotes----------

[1] Workers' compensation law governs whether an employee may maintain a personal injury action based on injuries arising within the scope of his employment. States' rules vary with regard to the scope of the exclusive-remedy defense, thus raising workers' compensation choice-of-law issues, as in this case. See, e.g., Hauch v. Connor, 295 Md. 120, 453 A.2d 1207, 1211 (Md. 1983). Because Maryland is the forum state for this diversity action, we must look to Maryland choice-of-law principles.

[2] Indeed, in most states, employers who do not fulfill their insurance obligations are not immune from suit. See, e.g., Md. Code § 9-509(b) (employee may bring an action for damages where employer fails to secure workers' compensation insurance).

[3] The majority relies on inapposite Maryland authorities to suggest that, under Virginia law, VEPCO did not contractually shift the entire risk of workers' compensation liability to Asplundh. See ante at 8-9. In fact, Asplundh (and not VEPCO) was responsible for Mr. Banks's workers' compensation benefits. Further, in the Maryland authorities relied on by the majority, the principal contractors were "statutory employers" under Maryland law -- unlike VEPCO here -- and were therefore liable for Maryland workers' compensation benefits. See cases cited ante at 8-9.

In any event, the question is whether the Maryland courts would find that VEPCO bore sufficient risk to justify a conclusion that Virginia has "greater interests" than Maryland in this action. The majority provides no authority contrary to my view that Maryland has the "greater interests" here, and that its courts would permit Banks to pursue a judicial remedy against VEPCO.

No. AW 98-3585

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND
SOUTHERN DIVISION

CLYDE W. BANKS; MARGARET L. BANKS, Plaintiffs

v.

VIRGINIA ELECTRIC & POWER COMPANY, a Corporation of the Commonwealth of Virginia, licensed to do business in the State of Maryland, Defendant

Filed 3/4/99

MEMORANDUM OPINION

I

Currently pending before the Court are Defendant's Motion to Transfer Venue, and Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction. A hearing was held in open court on February 22, 1999. In ruling upon the motion, the Court has considered the motion, the opposition thereto, the arguments made by counsel in open court, and the entire record, For the reasons that will follow, the Court will grant Defendant's Motion to Dismiss and deny Defendant's Motion to Transfer as moot.

II

Plaintiffs, Clyde W. Banks, his wife Margaret L. Banks have brought this suit against Defendant Virginia Electric and Power Company ("VEPCO"). The Banks are citizens of Delaware, and VEPCO is incorporated under the laws of the

Commonwealth of Virginia VEPCO however, also conducts business in the state of Maryland.

Mr. Banks was an employee of Asplundh Tree Expert Co. ("Asplundh"), a Pennsylvania corporation. Mr. Banks maintains that "[a]t all times relevant to this cause of action, [he] was employed by Asplundh in the State of Maryland as a supervisor of tree trimming crews employed by Asplundh." Complaint at 2, ¶ 7. He also asserts that he paid state income taxes Maryland due to this job.

This cause of action arises out the events of September 10-11, 1996. Earlier that month, major storm hit southern Virginia. As a result of this storm, VEPCO's power lines were damaged by fallen trees and tree limbs. Thus, electrical service by VEPCO to its customers had been interrupted. Mr. Banks maintains that "VEPCO contracted with Asplundlh to provide work crews from Maryland to travel to Virginia to clear the fallen trees arid tree limbs so that electrical power could be restored to the area." Complaint at 2, ¶ 10.

Mr. Banks contends that, while under Asplundh's exclusive power and control, he supervised a crew removing trees and tree limbs from VEPCO'S lines in Clover, Virginia, He further maintains that while supervising this team he was electrocuted. Mr. Banks states that VEFCO employees had assured him and his crew that the power lines had been de-energized and would remain so during their work. He also contends that VEPCO employees told him that he would be informed prior to the re-energizing of the lines. Despite these assurances, Mr. Banks maintains, VEPCO employees re-energized the power lines around midnight.1 Mr. Banks asserts that the "power surged through the lines, arced and bolt of electricity struck [him] and knocked him to the ground." Complaint at 4, ¶ 19. Mr. Banks also states that, seconds later, he was hit again by a bolt of electricity, he lay on the ground.

After the incident, Mr. Banks was removed by ambulance to Halifax Hospital South Boston, Virginia. He was then transported to University of North Carolina Hospital in Chapel Hill, North Carolina He remained an inpatient there until his discharge on November 22, 1996. He then began receiving treatment in Salisbury, Maryland.

Mr. Banks maintains that he has suffered "severe extensive, life-threatening, permanent injuries to his body and extensive varied damages as a result of being stuck by the electricity." Complaint at 4, ¶ 22. On September 4, 1998, Mr. and Mrs. Banks brought suit against VEPCO in the Circuit Court for Prince Georges County, Maryland The complaint stated four grounds for the suit: negligence, loss of consortium, gross negligence, and loss of consortium/gross negligence. On October 23, 1998, VEPCO removed the case to this Court. On February 22, 1999, a motions hearing was held.

III.

Defendant moves to dismiss this case for lack of subject matter jurisdiction, pursuant to Federal Rules of Civil Procedure 12 (b)(1). Defendant contends that the Complaint should be dismissed because it claims that, under Virginia law, Mr. Banks was its statutory employee. Therefore, Defendant argues the Banks' exclusive remedy is to claim workers' compensation benefits under Virginia Code Ann. § 65.2-307 Defendant contends that this suit is barred by Virginia law, and the Court thus lacks subject matter jurisdiction. The Court agrees.

As this case is based on diversity jurisdiction, this Court must apply the choice of law rules of its forum state, which is Maryland. Defendant contends that Maryland follows the lex loci delicti doctrine, and thus Virginia's substantive law will apply because the accident occurred in Clover, Virginia. See Hauch v. Connor. et. al. 453 A. 2d 1207 (Md 1983).

Defendant also argues that "in eases involving the question of whether an employer is immune from suit by an employee or statutory employee, Maryland's choice of law rules extend well beyond the doctrine of lex loci delicti, arid require the application of the workers' compensation law of any state in which the defendant employer could have been liable to the plaintiff employee for workers' compensation benefits." Defendant's Memorandum in Support at 5-6 Defendant claims that as the accident occurred in Virginia, and the employment relationship between Banks and Virginia was formed in Virginia, it could only be liable under Virginia law for workers' compensation benefits. Thus, Defendant claims that Virginia law must be applied.

Plaintiffs, on the other hand, argue that Maryland workers' compensation law, not choice of law rules dealing with tort law, should determine whether the Banks have the right to bring this suit. They rely on Hauch, Bishop v. Twiford, 562 A.2d 1238 (Md. 1989). and Powell v. Erb. 709 A 2d 1294. In Hauch, the court stated that "many courts recognize that workmen's compensation law conflict issues present distinct policy questions and should not be treated as tort or contract matters for choice of law purposes. We agree with this approach." 453 A 2d at 1211. In that case, three Maryland employees, while within the scope of their employment, were involved in a car accident in Delaware. The passengers, after receiving workers compensation benefits from Maryland, brought suit against the driver, Under Delaware law, such suits were barred. Under Maryland law, an employee could sue a co-employee. If the Hauch court had merely applied the doctrine of lex loci delicti, it would have held that the passenger employees could not bring the suit, as Delaware law would apply. Instead, the court stated that "the choice of law issue in co-employee actions was not simply a matter of tort conflict of laws, and that Maryland public policy was an important consideration. Id. at 1213-14 (citing Hutzell v Bover, 249 A.2d 449 (Md.1969)). The Hauch court applied a

"greater interest" test to that case, and found that Maryland public policy, and the fact that Maryland had a more significant relationship with the parties and the case than Delaware, dictated that Maryland workers compensation law should be applied. id. at 1214. Thus, the plaintiffs were able to maintain their Suit against their co-employee.

The line of case upon which Plaintiff relies. however, is clearly distinguishable from the instant ease. All of those cases dealt with suits between co-employees. Bishop dealt with the same issues as Hauch. Powell, extended the Hauch holding to wrongful death suits between co employees. The Banks have not brought this suit against the VEPCO employee who allegedly re energized the power lines, but against VEPCO itself. Thus, the instant case deals with the employer-employee relationship.

Although VEPCO was not Mr. Banks' immediate employer, it could be his statutory employer. In Hauch, the Court of Appeals set forth the general rule for choice of law as it pertains to claims by an employee against a statutory employer. The Court stated:

Suits by employees against their immediate employers for injuries arising out of and in the course of employment are now barred by virtually all workmen's compensation statutes in this country. Nevertheless, 'because of varying miles as to the availability of the exclusive-remedy defense to the statutory employer," choice of law issues arise with respect to suits against statutory employers. . . In these suits, it is generally held that the forum state will enforce a bar created by the exclusive remedy statute of any state in which the employer may be liable for workmen's compensation benefits. .. . Although the outcome in some of these cases is the same as ft would be if the rule of lex loci delicti were applied, the underlying rationale in holding the employer immune is different. The rationale is that the employer has

undertaken the burden of supplying workmen's compensation insurance in return for immunity from suit.

453 A.2d at 1211 (citations omitted).

Further, time Hauch court distinguished between employee-employer suits, and co-employee suits, stating that "[t]he rationale for precluding employee-employer suits does not apply in actions by employees against fellow employees." at 1211-12. Plaintiffs argue that the greater interests test should be applied because VEPCO is self-insured, and thus, they maintain, are not within the rationale behind the general rule. Plaintiffs have not provided, however, nor has the Court found, any case law that deviates from the general rule for employer employee cases. Therefore, the Court believes the general rule will apply in this case.

Plaintiffs have provided a detailed discussion of why under Maryland law VEPCO would not be regarded as Mr. Banks' statutory employer. The Court does not have to address this argument, however, as Virginia law would clearly regard VEPCQ as Mr. Banks' statutory employer. Thus, following the general rule, a Maryland court would enforce Virginia's bar in this case.

IV

Under Virginia law, workers' compensation benefits are the exclusive remedy for an employee injured on the job, Va Code Ann. § 65. 2-307 states:

The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative,

parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

Virginia workers' compensation law covers not only immediate employers, but also statutory employers. Under Va. Code. Ann. § 65.2-302, a "person" is a statutory employer when that person:

undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner[.] [T]he owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

The immunity granted by § 65.2-307 applies to statutory employers "even where the employees employer carrie[s] Workmen's Compensation for his employees, and thus makes] it unnecessary for the employee to look to the owner for said benefits." Snowden v. Virginia Electric and Power Co., 432 F. Supp 266, 268 (E.D. Va 1976).

The instant action will be barred under Virginia law if it can be shown that at the time of the injury VEPCO was Mr. Banks statutory employer. This determination is made by ascertaining whether Mr. Banks was performing work which was part of VEPCO's "trade, business or occupation." See id at 269. As VEPCO is a public service corporation. Henderson v. Central Telephone Co. of Virginia 233 Va. 377 (Va 1987) applies. In that case, the Supreme Court of Virginia held that the determining factor of what constituted a public utility's or governmental entity's trade, business, or occupation was what it was required or authorized to do, not what its actual employees did.

VEPCO notes that "[a]s a public service corporation, Virginia Power is obligated by statute to provide electric service to residents and business of the Commonwealth of Virginia." Defendant's Memorandum at 2. Further, VEPCO's tariff, filed with the Virginia State Corporation Commission mandates that it employ "reasonable efforts to furnish an uninterrupted supply of electricity to its customers." Id. Defendant asserts that it routinely "utilizes it own employees as well as employees of contractors such as Asplundh" to "fulfill its duty and obligation to repair and maintain electric lines." Id. at 3.

At the time of his injury. Mr. Banks was assisting VEPCO in removing a tree from a distribution line so that VEPCO could restore its service to its customers. Mr. Banks contends h was under the exclusive control of Asplundh while performing this work. However, as VEPCO is required, by statute and tariff, to provide continuous service, and to repair and maintain its lines, work such as the trimming of trees so that power can be restored is part of VEPCO's trade, business, or occupation.

This case is analogous to Snowden. In that case an employee of a subcontractor was injured, while driving steel piles into the ground at the site of concrete foundations for electric utility poles, when his crane struck VEPCO's power lines. The court found that the plaintiffs work, which was essential to the improvement of VEPCOs power lines, was part of its trade, business and occupation, even though VEPCO did not employ any workers itself for that purpose Snowden, 432 F. Supp at 270 Just as driving the steel into the ground so that the existing poles could be replaced was part of VEPCO's trade, business and occupation, so to is removing the trees from the lines so that power could be restored. This work was necessary for VEPCO to fulfill its statutory duty to provide continuous service to its customers. Thus, Plaintiffs' negligence claims are barred by Virginia law, and .the loss of

consortium claims are barred as well, as they arise out of the work-related injuries.

V

Plaintiffs also argue that their complaint contains allegations that Mr. Banks' injuries were the result of intentional conduct by the Defendant. Plaintiffs maintain that Virginia recognizes an exception to its statutory immunity provision for intentional torts. Plaintiffs rely on McGreevy v. Racal-Dana Instruments, Inc., 690 F. Supp 46S (E.D. Va 1988), a federal case predicting that Virginia state courts would recognize an intentional tort exception. However, in Haddon v. Metropolitan Life Insurance Co., 389 S.E. 2d 712 (Va 1990), the Supreme Court of Virginia held that intentional torts were within the meaning of "accident" as that word is defined in its workers' compensation law. The Court stated:

Although Haddon asserts that this ease raises an issue of first impression for this Court, we have previously decided a number of cases which required us to construe the term "accident" for purposes of the Act. As early as 1934, we stated that "it is now well settled... that although the injury is the result of the willful and intentional assault of either a fellow-employee or a third person, this fact does not prevent the injury from being accidental within the meaning of the act.", . . We have also consistently defined accident as "an event which ... is unusual and not expected by the person to whom it happens."...

While an "exact, comprehensive, legal definition [of accident] as applied to all circumstances" may be impossible. . . we have long-standing precedent applicable to this case which places an injury caused by the intentional tort of an employer or fellow employee within the definition of injury by accident under the Act.

389 S.E. 2d at 713-14 (citations omitted).

Therefore, Virginia does not recognize an intentional tort exception. Plaintiffs note that

Haddon was overruled by Lichtman v. Knouf, 445 S.E. 2d 114 (Va. 1994). The Lichtman court, however, did not overrule Haddons holding that an injury stemming from an intentional tort could be considered an "injury by accident." The Haddon court had held that the plaintiff in that case was barred from bringing an intentional infliction of emotional distress claim based on sexual harassment which occurred over an extended period of time. The Lichtman court stated that there was a "longstanding rule that an 'injury by accident' for purposes of the Act does not include a gradually incurred injury." Lichtman 445 S.E. 2d at 115. The Lichtman court overruled Haddon "to the extent that it placed gradually incurred injuries within the definition of injury by accident.'" Id.

The injuries suffered by Mr. Banks in this case were not gradually incurred over a period of time. Mr. Banks was hit twice by bolts of electricity on the same night. His injuries stem from this event, not a repeating occurrence, over an extended period of time. Therefore, even the conduct of the Defendant was intentional, Plaintiffs' suit is still barred by Va Code Ann. § 65.2-3 07.

VI

Finally, Plaintiffs argue that Defendant's motion is procedurally improper. Plaintiffs contend that this Court has subject matter jurisdiction, because the requirements of diversity jurisdiction are met. Plaintiffs maintain that Defendant is trying to have the Court prematurely address the case on the merits. Plaintiffs contend that Defendant should have filed a Rule 12(b)(6) motion for failure to state a claim

upon which relief could be granted, instead of the present motion. As it attached exhibits to its motion, Defendant states that it would not object to the Court considering its motion as a motion for summary judgment Regardless of what procedural mechanism is applied, the Court believes that, as a matter of law, Plaintiff is a statutory employee, and cannot bring this suit. Other courts faced with similar issues have granted motions to dismiss pursuant to 12(b(1) See Lorenz v CSZ Corp., 980 P.2d 263 (4th Or 1993) (exclusive remedy provided under Railway Labor Act); Snwoden, 432 F. Supp 266. Thus, this Court will want Defendant's Motion to Dismiss.

As the Court has found that it lacks subject matter jurisdiction over this case, the Court does not need to address Defendant's Motion no Transfer Venue. Accordingly that motion will be denied as moot.

A separate order consistent with this opinion will follow.

Date /s/Alexander Williams

Footnotes

1Thus the event occurred either on September 10 or on September 11, 1996

28 USCS § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $ 75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State

where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 USCS § 1446
§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district

court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a wavier of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930 [19 USCS § 1337(c)], the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act [19 USCS § 1337].